***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

CORRECTED COPY 6/18

# 76-1113

## United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*against*

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## JOINT BRIEF FOR APPELLANTS


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## QUESTIONS PRESENTED

1. DID THE COURT ERR IN NOT DISMISSING THE INDICTMENT BECAUSE OF A VARIANCE BETWEEN THE PROOF AND THE INDICTMENT? THE GOVERNMENT CLAIMED A SINGLE CONSPIRACY. MULTIPLE CONSPIRACIES WERE SHOWN.

2. DID THE COURT ERR IN FAILING TO MARSHALL THE EVIDENCE AND IN FAILING TO APPROPRIATELY FOCUS THE JURY ON THE INDIVIDUAL GUILT OF EACH DEFENDANT?

3. DID THE COURT ERR IN FAILING TO SUPPRESS THE WIRETAP?

## STATEMENT PURSUANT TO RULE 28(3)

### Preliminary Statement

Appellants, FRANCISCO ADRIANO ARMEDO-SARMIENTO, EDGAR RESTREPO-BOTERO, LEON VELEZ, JORGE GONZALEZ, LIBARDO GILL, RUBEN DARIO RODAN, CARMEN GILL, WILLIAM RODRIGUEZ-PARRA and OLEGARIO MONTES-GOMEZ, appeal from a Judgment of the United States District Court, Southern District of New York (Cannella, J.) convicting them of conspiring to import, distribute and sell narcotics in violation of 21 USC 812, 841, 952 and 960.

Appellants were sentenced, as follows:

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|---|---|
| SARMIENTO | - 15 years and $25,000 fine. Special Parole - 5 years. |
| BOTERO | - 15 years and $10,000 fine. Special Parole - 5 years - Sentence to run concurrent to 73CR729 - (5 years) |
| VELEZ | - 5 years and $5,000 fine. Special Parole - 3 years. |
| ROLDAN | - 7 years and $5,000 fine. Special Parole - 5 years. |

| | | |
|---|---|---|
| CARMEN GILL<br>LIBARDO GILL | ) | - 10 years and $20,000 fine. |
| GONZALEZ | | - 7 years - Special Parole - 5 years. |
| PARRA<br>MONTES-GOMEZ | ) | - 10 years - Special Parole - 6 years - Sentence to run concurrent to 10 year Federal sentence in Texas. |

There are issues common to all appellants. In accord with the admonition of the Federal Rules of Appellate Procedure[1/] to treat common issues jointly and to avoid duplication[2/] these issues are being treated separately only in this Joint Brief. However, counsel for all appellants participated in the analysis of the law and assisted in the preparation of the fact patterns hereinafter set forth. It is anticipated that they may address separate remarks in their briefs to the issues raised herein as these issues may apply to any particular appellant and to raise separate points in separate briefs as they apply specifically to their particular cause.

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1. Hereinafter referred to as FRAP.

2. Rule 28[i] FRAP.

## FACTS

### Introduction

The matter before the Court in the instant appeal involves a mass narcotics conspiracy trial. It is a trial involving vast numbers of people,[3] covering activities over a five year period; a trial extending over thirteen [13] weeks, covering 9000 pages of transcript, 105 Government witnesses; a trial dealing with the seizure and introduction into evidence of 28 kilos[4] of cocaine, tons of marijuana, numerous weapons; testimony dealing with transactions covering three continents, involving all manner of crimes unrelelated to what defendants stand accused. Whether this statement fits into the semantical designation of a single conspiracy or a multiple conspiracy, it flies in the face of the clear and oft repeated admonitions of this Court that this type of trial

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3. 38 defendants - 410 co-conspirators.

4. The Government introduced physical evidence of 25 drug seizures: GXs 13,20,21,30,53,55,75,91,117,129, 133,144,145,146,147,148,191,300,311,321,355,400,440, 443,538. Of these seizures only 5 were seized from defendants on trial: GXs 53,55,139,355,538. In addition there was mention of uncounted sales of cocaine and marijuana most of which did not directly bear on defendants on trial.

is fundamentally unfair[5] and that the Government must cease in its use of this prosecutorial format.

It is instructive to note that of the 9000 pages of transcript less than 100 pages deal with defendants PARRA and GOMEZ and less than 250 pages deal with defendants VELEZ and GONZALEZ. The entire testimony as to many of the defendants (e.g. Arco) consumed no more than a long afternoon's session; only three of the Government's 105 witnesses testified against PARRA and GOMEZ and only one incriminated them.[6]

Of the 556 Government exhibits only four pertain to appellant PARRA and five[7] to GOMEZ.

Of the 200 odd tape recordings played at the trial, not one pertains to either appellants PARRA, GOMEZ or BOTERO. Fully eighty per cent of the testimony, cocaine seizures and exhibits dealt with individuals who did not go to trial or were not named as defendants. None of the gun seizures pertain to any of the appellants except

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5. U.S. v. Sperling 505 F.2d 1323 (CA2 - 1974); U.S. v. Bertolotti 529 F.2d 149 (CA2 1975).

6. Carmen Caban.

7. Exhibits 23, 38, 49 and 54 are PARRA Exhibits. Exhibits 38, 39, 48, 52 and 53 are GOMEZ Exhibits.

defendant BOTERO, nor were they charged with use of guns as a crime.

None of the defendants participated, nor were they involved in any way with any of the barbaric acts of William Andries. None of the defendants were charged with, nor did they commit crimes such as murder, robberies or blackmail, yet these crimes were brought out at the trial. None of the defendants were shown to have used fifteen year old girls to transport cocaine, yet this was also brought out at the trial.

The Indictments

Indictment S75CR429 [A-18],[8] the indictment under which defendants were tried, is an amalgam of and supersedes the following indictments:

1. 74 CR 494 [A-51] filed May 11, 1974, alleged a conspiracy commencing on January 1, 1972 to import cocaine and marijuana from Colombia to the United States. The indictment named appellants PARRA,[9] GOMEZ, and BOTERO,[10] as well as defendants Bravo, Blanco,[11] Jose Cabrero,[12] Alvaro Cabrero,[13] Antonio Romero, Elsa Cabrero,[14] Arturo Gonzales, Ramiro San Cocho, Humberto Sandoval, Hugo Diaz and Alberto Herrera. In addition, seven "John Does" were named. The indictment also

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8. "A" References are references to Joint Appendix. "T" references are references to Transcript.

9. Throughout this factual statement appellants' names will appear capitalized.

10. Also known as Omar Hernandez and Edgar. He will be referred to as Edgar in this brief as he was during the trial.

11. Also known as "Gris", "Godmother" and Madrona."

12. Referred to as "Pepe."

13. Pepe's brother.

14. Pepe's wife.

charged one substantive count involving all the named defendants. The focus of this indictment was New York City.

2. 74 CR 817 [A-60] filed August 19, 1974, alleges a conspiracy commencing on July 1, 1972 to the date of the indictment to import Cocaine and Marijuana from Colombia to the United States. The indictment names Pepe, EDGAR and Herrera but no other defendants named in 74 CR 494. In addition, it names Gaston Robinson, Ramiro Bermudez, William Andries, Joseph Leal, Carlos Guarin, Rhonda Sue Shirah and Gilberto Mejia. The focus of this indictment was Florida.

3. 74 CR 910 [A-60] filed September 25, 1974, covering a period from May 1, 1971 until the filing of the indictment names only Arturo Gonzales and Cesar Rincon. The indictment alleges a cocaine and marijuana conspiracy having its source in Colombia and its final distribution in the United States. The focus of the conspiracy was in New York.

4. 74 CR 939 [A-67] filed October 4, 1974, named 29 defendants including Cesar Rincon, RUBEN DARIO ROLDAN, Beatrice Gonzalez, Nina Nino, Oscar Perez, ERNESTO GUELLO, LIBARDO and CARMEN GILL, Grisalda

Blanco, FRANCISCO ARMEDO SARMIENTO,[15] Alberto and Bruno Bravo, Marconi Roldan, Oscar Perez, LEON VELEZ, JORGE GONZALEZ, Julian Carrion Arco and others. This indictment likewise alleges a conspiracy to import cocaine and marijuana from Colombia and to distribute it in the United States. Significantly, it excluded all those involved in Indictment 74 CR 494 and 817. The conspiracy centered in New York City.

5. 74 CR 1128 [A-82] filed November 27, 1974, consolidated indictments 1 and 3. [74 CR 494 and 74 CR 910]. It superseded 74 CR 494 by adding Rincon and Gonzales.

6. Finally, S75 CR 429 filed on April 30, 1975 amalgamated indictments 1, 2, 3, 4 and 5 into the document before this Court for consideration. Significantly, each indictment was referred to a different Judge of this Court for trial prior to the final indictment.

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15. Hereinafter referred to as "Mono."

## The Conspiracies

The matter before this Court was tried on the theory that there existed a single conspiracy to import and sell Cocaine and Marijuana having its source in Colombia with the ultimate terminus in New York City. The time frame of the conspiracy was from January, 1972[16/] until October, 1974. The Government's proof, however, was at variance with its theory for the proof clearly showed three distinct conspiracies.

Segment I, covering the period from late 1971 until July, 1973, centered in New York City and involved the distribution of drugs by defendants EDGAR and Pepe. The source of these drugs was shown to be centered in Colombia and involved Alberto Bravo, his brother, Bruno, Griselda Blanco, Oscar Catiri and others of lesser importance. Acting as conduits between the Colombian source [The Bravo Group] and the New York distribution terminus were couriers such as defendants PARRA and GOMEZ. The principal witnesses of this segment were Carmen Caban

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16. Although the indictment dates the beginning of the conspiracy as January 1, 1972, testimony was permitted as to events occurring as early as 1969. [T-189,190,941,1136-37]

and Rita Ramos. This segment came to an end in July, 1973, with the arrest of EDGAR, Pepe, Rita and Carmen in July and PARRA and GOMEZ in June of that year.

Segment II deals with the activities of named defendant William Andries and his group and covers the period from May, 1973 until early 1974. It dealt with the activities of Andries and included Pepe briefly and was perhaps the most prejudicial aspect of the entire trial. This segment had its focus in Miami and the proof was furnished by the testimony of William Andries and co-conspirator, Lionel Fernandez. Except for transient references to Pepe, who had fled to Miami after the July arrests in New York, no connection existed between Segment I and Segment II. There was no evidence adduced that the Bravo Group was the source of the Segment II drugs. This Segment closed with the arrest of Lionel Fernandez, Gaston Robinson and Billy Andries in early 1974.

Segment III covered a period from January to October, 1974. It centered again in New York City with defendant Mario Rodriguez and MONO as distributors for the Bravo Group. LIBARDO and CARMEN GILL, Beatrice Gonzales, JORGE GONZALEZ, RUBEN DARIO ROLDAN and LEON VELEZ were pictured as assisting MONO and Mario in the

distribution network and in transmitting funds back to Colombia. The Government's proof with respect to Segment III consisted of approximately 200 tapes conversations resulting from wiretaps placed on the telephones of Lydia Prada, MONO and Mario. Operating in tandem with the playing of these conversations, was the testimony of various surveilling and undercover officers. Lastly, the surveillance and the tape recordings were supplemented by testimony of officers who made arrests from time to time, presumably as a result of information obtained from the wiretaps. This entire operation was the product of a joint Federal and State investigative effort code-named "Operation Banshee." It is significant that the only connection between Segment I and III, is the source of drugs; in both cases the Bravo Group.

Segment I - The Activities of Pepe and EDGAR.

Segment I deals essentially with the testimony of Carmen Caban[17/] and Rita Ramos. From 1969-1972 they worked as barmaids in various establishments in New York, owned and operated by Morty Carlin,[18/] a small time dealer

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17. Caban at one time was the Paramour of Edgar (July-December, 1972) and Pepe (January-July 1973).

18. Ramos at one time lived with Morty Carlin. Carlin is now deceased.

in cocaine and marijuana. Carlin was supplied by various unrelated sources among whom were Pepe and Hugo Diaz [T-232]. Diaz was a named defendant but did not proceed to trial. During this period of time, Carlin was also being supplied by other individuals unrelated to either Pepe or Diaz, including "Mario", "Louis", and "Raul," [T-218] none of whom were named as co-conspirators.

Carmen and Edgar

A relationship developed between Carmen Caban and Edgar. In July, 1972 she moved into Edgar's apartment on 69th Street, Queens, New York. During her stay in his apartment, she had occasion to observe people who came and went and on frequent occasions answered telephones, took messages and received deliveries. In July, 1972 she first met an individual named Oscar Catiri [T-1153] who was present in Edgar's apartment at the time she moved in.

Carmen's Colombian Trips

In August, 1972 and again in December, 1972, she took trips to Colombia where she met Alberto Bravo, Griselda Branco, Catiri, Bruno Bravo and other individuals comprising the Bravo group. She delivered to them approximately $16,000.00 in cash presumably as part of the business profits. [T-1317] She was shown the home of "a lady of Antioquia" [T-1321] who manufactured modified bras, girdles and shoes used by couriers in the transportation of cocaine from Colombia to New York. She also met Bernardo Roldan whose alleged function was to prepare false passports for the couriers and those

more deeply involved in the core group [1392]. However, there is no evidence as to whether ROLDAN worked as a private entrepeneur for any individual desiring a false passport or was part of the Bravo group.

The Couriers

Between her return in September, 1972 and her second trip in December 1972, she bore witness to the delivery of several shipments of cocaine which arrived from the Bravo Group. In October 1972, she answered a call from Catiri directed to EDGAR, to the effect that two couriers were bringing in a "shipment" due to arrive the following day. The message was given in a thinly veiled code[19] [T-1255]. On the following day, two men named "JAIRO" and "Miguel"[20] arrived with cocaine packed in the false bottoms of a number of pairs of shoes in their possession. The shipment was subsequently unpacked and stored in EDGAR's apartment and each of the "boys" were paid $1,500.00. Present in the apartment were EDGAR, Caban and co-defendant Arturo Gonzales,[21] who were

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19. "The boys left for the voyage."

20. "JAIRO" was later identified as defendant PARRA; "Miguel" was identified as Adol Rivera, now deceased.

21. Arturo Gonzales is repeatedly referred to as Abram throughout the trial but although a named defendant, was not actually tried under this indictment. He is also the half-brother of co-defendant and appellant JORGE GONZALES.

presumably present to negotiate for the purchase of part of these drugs. There is no evidence that he was a partner of EDGAR's but merely one of many customers purchasing from him.

Similarly arranged shipments subsequently arrived by other couriers; specifically, "Callegas" [T-1261], "PICHARILLO" [T-1266], later identified as defendant GOMEZ, and defendant PARRA, a second time. All shipments were secreted in the soles of false bottom shoes. On occasions shipments arrived by woman couriers. In November, 1972 and in February, 1973, women named Aracelli [T-1272] and Dianna, arrived with cocaine secreted in their bras and girdles.

Each shipment of cocaine resulted in the payment of $1,500.00 for each of the couriers.

At the time of Caban's tour of the Colombian facilities , Pepe was present.

Carmen and Pepe

Upon Carmen's second return from Colombia there took place certain modifications in the living arrangements of the main characters of this drama. Edgar met a young woman named Annie Sanjurjo[22/] in November, 1972. This turned out to be an unhappy circumstance for Carmen

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22. Referred to as LaNegra.

and to avoid an embarrassing menage a trois, she sought other living accommodations. In January, 1973, she moved into Pepe's 54th Street apartment in Manhattan which was fortunate for the Government's case inasmuch as it happily provided the means for the continuation of her story.

From January, 1973 until her arrest in July of that year, Carmen was Pepe's constant companion. She served the same function for Pepe as she had for EDGAR.

Caban also testified to various trips taken by Pepe to Miami Beach and the Carribean. On one such trip she saw or heard a Florida radio or television report of two Colombians arrested in Texas on June 11, 1973 while attempting to smuggle cocaine into the United States. She allegedly told Pepe of this, who called Colombia to learn that two couriers had been sent to the United States through Texas. As events later proved the two individuals were defendants PARRA and GOMEZ.[23/]

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23. Evidence of false passports was introduced as was the physical evidence of the cocaine and shoes wherein the cocaine was secreted. Defendants subsequently pleaded guilty to the importation of cocaine in the United States District Court for Texas and were sentenced to 10 years. It should be noted that the Magistrate's complaint alleged the crime of possession and conspiracy. Defendants were not indicted for the conspiracy.

The July Arrests - Carmen, Edgar and Rita:

Shortly after her return from the Carribean trip in June, 1973, Carmen was arrested in Pepe's apartment and Pepe himself narrowly escaped arrest. The arrest occurred on July 26, 1973 and $50,000.00 in cash plus an assortment of weapons and ammunition was confiscated. In addition, various quantities of cocaine plus drug paraphenalia and documents were likewise seized - [GX's 111-135].[24/]

On July 16, 1973, Jose Hurtado was arrested at the Los Angeles Airport [T-1872] for smuggling cocaine intended for EDGAR. Hurtado decided to "cooperate" with Government officials and on July 17, 1973, EDGAR was

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24. Following a trial in New York State Supreme Court [Polsky,J.] Miss Caban and her sister Gloria were convicted of criminal sale of a controlled substance in the First Degree. Sentence was adjourned from the date of conviction in early 1974 until after the instant trial in January, 1976. Criminal sale in the First Degree [Sec.220.43 New York State Penal Law] carries a mandatory minimum sentence of 15 years to life. In perhaps one of the most startling episodes of a strange trial, it was revealed that the Government proposed to the trial judge, the State prosecutor and defense counsel that the verdict be set aside, even though there was no basis in law for such action, and defendant plead to a lesser offense carrying no minimum sentence. The Government's suggestion was ultimately carried out and Ramos was sentenced to 3 years incarceration which amounted to time then actually served.

arrested at the Hotel Taft while attempting to make a pickup of a dummy package of drugs delivered by Hurtado arranged by Government agents.[T-1877] Earlier that month Rita Ramos was arrested in an apartment on 106th Street in Manhattan for possession of cocaine [T-301]. She subsequently became a "cooperating individual" for which the Government rewarded her by inducing the Court to suspend her sentence. Unfortunately for Miss Ramos, she was again arrested in January, 1974 when the Government found to its chagrin that Miss Ramos was trading in cocaine not only as an undercover agent but as a private entrepeneur. The Government could not tolerate this flight into free enterprise even for one of its "cooperating individuals."

SEGMENT II - The Andries - Robinson Operations

Segment II consists essentially of the testimony of William Andries and Lionel Fernandez. The testimony covers the activities of those individuals mentioned in Indictment 74 CR 817 [A-68] and several individuals not named as defendants or co-conspirators.

The period covered is from May, 1973 until March, 1974 and concerned activities centered in Florida.

In addition to those named as defendants and

co-conspirators such as William Andries [Billy the Kid], Gaston and Clayton Robinson, Ronald Chandler, Phil Siegel, Ray Scher, Lionel Fernandez and Patsy Cravero, there were numerous individuals prominently mentioned who were not named as defendants or co-conspirators.

For example, individuals named Woods, Riviero, Greenwood, Coffee, Miller and Cove were all mentioned as part of Andries' "gang." Ogden was named as a cooperating boat captain assisting Diablo Robinson [T-2000]. All were quoted by Andries in his testimony as if they were co-conspirators. All of the above were part of Andries' organization.

Andries' testimony was designed to tie in the New York Segment with defendant Gaston Robinson. The Government sought to accomplish this by use of Pepe as the connecting link.

Three areas of proof are of importance in analyzing Andries' testimony:

1. Pepe's relationship to Andries and his organization.

2. Andries and his Group's source of drugs.

3. Andries' organization and distribution network for the sale of drugs.

Andries and Pepe

Andries first met Pepe at the Bull & Bear[25/] Restaurant where he was introduced to him by defendant Gaston Robinson and his brother Clayton. [T-1996][26/]

Previously, in December, 1972 he had seen Pepe. He had seen Pepe [but had not formally met him] loading a shipment of 1300 pounds of marijuana intc the back of a station wagon left outside of Andries' house [T-1997-1999]. Andries had been instructed by "the people from Medellin" [T-1999] to leave the marijuana parked in a car outside his home in Miami and that someone would pick it up. Andries had observed the transfer through binoculars, "to make sure it was not somebody who was not supposed to get it." [T-1998]

Shortly after Andries and Pepe formally met at the Bull & Bear Restaurant, Andries asked Pepe to provide

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25. There was testimony of a "Omar" Hernandez being present but when Andries was asked if he saw "Omar" in court he answered in the negative [T-2218].

26. Pepe was introduced as Juan Molina. At the time of the meeting he was a fugitive and intended tc set up permanent residence in Florida. It was also his intention, later fulfilled, to bring his wife, Elsa and his brother Alvaro, to Miami from Colombia.

a boat for a pickup of marijuana and cocaine from a ship called the Providence Trader. As payment for use of his boat, Pepe would receive part of the marijuana and cocaine [T-2004].

Subsequently in February, 1974 he delivered 1700 pounds of marijuana to Pepe [T-2018]. There was no evidence of method of payment.

Much of Andries' testimony is taken up with his avowed distrust of Pepe. When Andries arrived to pick up Pepe's boat prior to meeting the Providence Trader, he observed Pepe "with a bunch of his friends standing around." He further testifies:

> "I decided I would take Pepe with me because he knew I was going out to get the stuff and I didn't want anybody knowing or somebody would be waiting for me and Gaston to get back to kill us." [T-2006]

Although Andries dealt with Pepe from November, 1973 until Andries' "retirement" in March, 1974 [T-2022] he never dealt with any of Pepe's associates nor was he able to identify any except for a fifteen year old girl named Rhonda Sue Shirah[27] who acted as Pepe's

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27. Rhonda Sue Shirah was arrested in August, 1974 in possession of 5 kilos of cocaine.

companion and courier [T-2029].

Andries' Source of Cocaine

In May, 1973, several months prior to meeting Pepe, Andries picked up a shipment of 10,000 pounds of marijuana from a parent ship captained by defendant, Gaston Robinson off Orange Cay. Andries stated that he was told by Gaston Robinson that he was paid by an Alberto Bravo for delivering the marijuana [T-1995]. The Government later stipulated, however, that the Alberto Bravo described by Andries was not the Alberto Bravo previously mentioned by Carmen Caban and later to be mentioned in Segment III of the trial. [T-2084]

Andries testified frequently about his trips to Colombia and Venezuela with Diablo and Clayton Robinson and Bill Osborne, the captain of the Providence Trader. He acknowledged his trips were for the purpose of purchasing drugs [T-2193] which he purchased from various people. One such individual was Carlos Martinez from Caracas [T-2193]. On another occasion, he deposited a sum of money in the Chase Manhattan Bank of Panama in the account of a drug supplier. Although there were other references to a Colombian source of marijuana and cocaine by Andries and Fernandez, the "source" was never

specifically identified as Oscar Catiri, Alberto Bravo, Griselda Blanca or any of the other defendants mentioned in Segment I or Segment III of the trial.

Andries' Organization

Much of Andries ' testimony dealt with the scope and sophistication of his own separate and distinct organization which dealt in heroin [T-1977] as well as cocaine and marijuana and in point of fact, dealt in all manner of crime and not merely the importation of drugs. In his conversations with Pepe, he continually used words such as "my group" [T-2001], "People I was involved with" and "my organization" [T-2003]. In point of fact, Mr. Andries had his own distribution network and sold marijuana to more than 100 people.[T-2016] He continually referred to "Pepe's group" or organization or "his associates."[28/] It was Andries who paid the captain[29/] and crew of the Providence Trader [T-2010].

Andries other business activities are of some

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28. In discussing Fernandez' role Andries stated "... he was involved with Pepe...not with me..."[T-2031]

29. Gaston Robinson.

interest. His chief occupation was not the smuggling of drugs but all manner of criminal activity which would result in profit including the commission of more than 100 armed robberies [T-2165,2174], 800 burglaries [T-2175], extortion [T-2176-7] and gun running [T-2019].

The Rip-Offs

Betrayal and "rip-offs" were common fears and practices in the world of Andries. Lionel Fernandez testified that he overheard Pepe speaking to "Omar" in New York concerning the planned theft of a large shipment of cocaine from "Ramiro"[30/] and "Mario" in Florida [T-2429]. On one occasion Pepe gave Lionel some cocaine on consignment. When Fernandez was arrested for selling it to an undercover agent, Pepe threatened to kill him unless he paid for the loss of the cocaine.

Andries himself was fearful of being ripped off by Pepe [supra]. Fernandez also described an incident where Pepe was robbed of $100,000.00 by a gang in Colombia while he was bringing money from New York to the Bravo group. In an attempt to retrieve the money a feud

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30. Later identified as Ramiro Bermudez.

developed resulting in Pepe removing his wife and brother from Colombia and bringing them to Florida [T-2352].

Counsel objected repeatedly to the inclusion of Andries' and Fernandez' inflammatory testimony [T-2025, 2368, 2369-70].

Segment III

On August 31, 1973, Luis Ramos, a New York City undercover Police Officer, purchased a 1/2 kilo of cocaine from Lydia Prada [T-3039]. As a result of this connection, a wire tap was placed on her phone which led to the identification of Mario Rodriguez as her source [T-3094].

A tap on his phone subsequently led to Mono, who in turn led agents to the other Segment III appellants. The tap was placed on Mario Rodriguez' phones at 61-20 98th Street, Queens, New York and at 61-25 98th Street. The taps were placed from January 28, 1974 until April 18, 1974 and from August 1, 1974 until his arrest on October 4, 1974.

The tap on Mono's phone was at 215 East 64th Street from April 8, 1974 until July 10, 1974.

The Government introduced some 200 wiretaps as well as the testimony of numerous police officers who

had maintained constant surveillance on Mono, Mario and others as part of "Operation Banshee" during the period of January - October, 1974. Most of the conversations made no direct reference to narcotics, but according to the Government, were in code. The Government supplemented the wire taps and testimony of surveilling officers with the testimony of customs and immigration officers showing various drug seizures at Toronto Airport and several at Kennedy International in New York, as well as seizures of presses, large amounts of cash, large amounts of drugs, weapons and books of account.

According to the Government, the proof showed:

a) That Mono was receiving cocaine from the Bravo Group, sometimes through couriers, but later in television sets and other appliances which Mono imported into the United States.

b) That Mario Rodriguez was also receiving cocaine from the Bravos and distributing it.

c) That CARMEN and LIBARDO GILL and several others were dealers working with Mono.

d) That RUBEN DARIO ROLDAN made several sales for Mono; and

e) That Beatrice Gonzalez and Leon Velez helped obtain money orders in order to transmit narcotics proceeds to the Bravo Group in Colombia.

The evidence shows the following:

RUBEN DARIO ROLDAN was observed frequently in the company of El Mono often driving him to various parts of the city and often being overheard in telephone conversations with him. The GILLS, Beatrice Gonzalez, Leon Velez and ROLDAN were observed from time to time entering various banks apparently for the purpose of purchasing money orders. Velez was overheard in conversation with the Bravos from time to time and had in the past, legitimate business dealings with them. Rodriguez, JORGE GONZALEZ, RO[illegible]N, VELEZ and Beatrice Gonzales we[illegible] seen entering Mono's apartment but no contraband was ever observed in the apartment. [T-5091 et seq.]

With respect to the conversations played, they covered the period from January 6, 1974 until October 4, 1974. The Government contend[illegible] that the conversations which included references to dozens of individuals using first names as common as Juan, Alberto, Dario, Carmen and Mario were drug related conversations. Yet nowhere in the 200 tapes conversations is there any use of words such as cocaine, heroin, marijuana or the accepted street equivalent. The Government contended at trial that the conversations were in code and the codes were obviously veiled references to drug transactions.

Many of the names used on the tapes were names of defendants actually on trial yet were admittedly not the defendants referred to. The name "Omar" was referred to in conversations 664 recorded on May 22, 1974 and again on May 23, 1974 in conversation 670. It was conceded by the Government that "Omar" was not the Omar Hernandez used as an alias of EDGAR.

There was testimony from Officer Troglio [T-4321-23] that on March 5, 1974, he observed Mario Rodriguez and a man named "Jairo" sifting white powder in an apartment on Pople Avenue, Bronx, New York. The only "Jairo" on trial at that time was WILLIAM RODRIGUEZ-PARRA a/k/a "Jairo" who had been in Federal custody since June, 1973. Likewise, conversation 760 recorded on July 12, 1974, on page 6 of the transcribed conversation refers to "El Loco Parra." This was stipulated not to be a reference to defendant PARRA by the Government [T-5212-13].

As in Segment I and Segment II, the Government introduced numerous drug seizures of individuals not on trial.[31/]

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31. Indeed, there is presently a sequel to this case, colloquially referred to in the Southern District as United States v. Bravo II. Included among the defendants are Mario and Estella Rodriguez, and Alberto Mejia.

On July 14, 1974, a woman named Maria Morena was arrested in Toronto International Airport in possession of cocaine secreted in coat hangers [T-4794-4854]. Three individuals named Jorge Hernandez, Jose Cruz and Jose Pizzaro were arrested in the Ontario Motel, Buffalo, New York on July 15, 1974. [T-4854]

On July 12, 1974, a woman named Bertha Gomez called Mario's apartment and spoke long distance to Jorge Gomez, a/k/a Hernandez. She said that she wanted "Jo gie" to go to Buffalo with a Puerto Rican because she was leaving for Toronto. She told him that when he got to Buffalo he should call Adriana Gonzalez at the Waldorf Astoria Hotel [Conversation 769]. Previously, Mario received an intercepted telephone call from Adriana Gonzalez from Puerto Rico. The connection between the four individuals was an intercepted telephone call from an Adriana Gonzalez to Mario advising that "six suits" were arriving. Maria Morena had in her possession six coat hangers stuffed with cocaine. In addition, she had in her possession a telephone book with the Pople Avenue address in it; the same address where Mario Rodriguez, Juan Mesa and "Jairo" had been observed sifting a white powder.

On August 23, 1974, a man named Alvaro Hernandez was arrested on East 125th Street for cocaine possession [T-5226]. The basis for introducing this testimony and evidence was a telephone book in Hernandez' possession with a telephone number of Rodriguez' mother.

On July 11, 1974, a man and a woman named Raul Diaz and Carmenza Gomez were arrested at Kennedy International Airport, Gomez had cocaine strapped to her body. Previously on July 1, 1974, a Carmen Gomez called Mario from Colombia and told him that the "receipts were ready" [Conversation 119]. Subsequently, Raul Velasquez a/k/a Diaz called Mario from Colombia further discussing "the receipts." [Conversation 134] Presumably, these calls were the basis for the introduction of the Gomez and Diaz arrests.

On July 7, 1974, Daniel Torres was arrested at 52nd Street and Roosevelt Avenue, Queens, New York, after leaving the Kennedy International Airport [T-5132-5136]. Earlier, Juan Mesa called Mario's apartment from Munich, Germany and spoke to his wife, Estella. He left a message that "his aunt would arrive at 11:00 A.M. on flight 408 Lufthansa Airlines." [Conversation 542 - July 7, 1974].

The Segment III defendants were arrested on the following dates:

| | | |
|---|---|---|
| MONO | - | September 3, 1974 |
| GONZALEZ | - | September 17, 1974 |
| C. GILL)<br>L. GILL | - | September 30, 1974 |
| ROLDAN )<br>VELEZ ) | - | October 4, 1974 |

## ARGUMENT

### POINT I

THE GOVERNMENT'S PROOF SHOWED THREE SEPARATE CONSPIRACIES RATHER THAN ONE. THE SHOCKING AND INFLAMMATORY TESTIMONY ON SEGMENT II, PREJUDICED EACH OF THE APPEALING DEFENDANTS AS DID VOLUMINOUS TESTIMONY IN THE SEGMENTS WITH WHICH THEY WERE NOT CONNECTED.

United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), United States v. Miley, 513 F.2d 1191 (2d Cir.1974) and United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) control the issue.

First is Sperling, which involved two groups. Sperling and his confederates distributed heroin; Pacelli and his confederates distributed cocaine. The connections between the two groups were sufficient to furnish grounds for a single trial. This Court, however, set forth strong views on the Government's mass conspiracy format. At page 1340, the Court stated:

"In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court,. . . we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials[25/] On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants." (Emphasis supplied).

* * * *

> "Ftn 25. The government has emphasized the admittedly symbiotic aspects of the relationship between the Pacelli and Sperling organizations in an effort to justify its decision to try the members of both groups together. While there is clear evidence of drug sales between Pacelli and Sperling, the ties among the members of each group were much stronger than the ties between the two organizations. It would have been much wiser for the government to have tried the appellants in two separate actions, one incorporating those linked with the Pacelli group and the other incorporating those linked with Sperling. Except for Lipsky, there was no common witness against memebers of both groups."

United States v. Miley, 513 F.2d 1191 (2d Cir. 1974) repeated Sperling's warning that the mass conspiracy format was "ill-advised", and invited reversals. (United States v. Miley, supra, at p.1195, 1207 n.10, 1210). There, the convictions were not overturned only because the trial was short, the defendants were few, and there was no testimony as to any particular defendant which differed substantially from that of any others. (513 F.2d at 1209).

In United States v. Bertolotti, (supra), there was no need to repeat the warnings, but simply to

apply them.[32/] The Court reversed the convictions. It found that the "single conspiracy" was, despite a common group, really several conspiracies, as shown by a Special Agent's memorandum referring to "Conspiracy No. 1" and "Conspiracy No. 2." Each of the appealing defendants had been "subjected . . . to voluminous testimony related to unconnected crimes in which he took no part" (529 F.2d at 157). Additional prejudice arose from the "obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics" found in the Mengrone wiretaps, which, although probative of one conspiracy, had no relevance to the other transactions proved at trial (529 F.2d at 158).

Taken together, Sperling, Miley and Bertolotti, state:

(1) We (i.e., this Court) know the Government's penchant to indict and jointly try multiple conspiracy defendants. Such trials are administratively undesirable. They do not save time. They create unwarranted burdens at the trial level. They create such burdens at the appelate level. They raise substantial questions

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32. The concurring opinion in United States v. LaVecchia 513 F.2d 1210 (2d Cir. 1975) also called the Government's attention to problems it created for itself by mass conspiracy trials.

of prejudice to defendants' substantive and procedural rights.

(2) We will no longer permit "single conspiracy" to serve as a cover for such trials. We will examine the facts realistically. We will include in our inquiry whether the ties among members of one segment are stronger than those between the different segments, and whether the witnesses on the different segments are common. If the facts break down into separate parts, we will reject the single conspiracy argument even where there are links at the top, or some other common core.

(3) In deciding whether reversal is appropriate we will examine the size of the case (Sperling suggested problems with a twelve defendant case and a 4000 page record); whether the indictment and/or trial followed the Sperling warning (both did in Bertolotti); whether the testimony includes "shocking and inflammatory" material, such as the Mengrone taps in Bertolotti; and whether the Government at any time viewed the individual segments as different conspiracies (see the reference to the Special Agent's memorandum in Bertolotti). We will be very concerned, moreover, with the extent to which the district

court properly focused the jury's attention on the complicated conspiracy issues. United States v. Sperling, (supra at 134).

A. Segment II is a Separate Conspiracy, Distinct From Segments I and III.

We examine first the Government's claim that Segments I, II and III form a single conspiracy.

As one gets farther from the core of a narcotics operation, there is almost never direct proof that defendants actually knew the scope of the conspiracy and therefore agreed to become part thereof. They have sometimes been charged with that knowledge on the theory that participants in substantial drug dealings must have been aware that the organization did not stop with those around them, see, e.g., United States v. Mallah, 503 F.2d 971 at 976; or where the Court found "mutual dependence and assistance", United States v. Tramunti; 513 F.2d 1087 (2d Cir. 1975), or a common aim or purpose. United States v. Agueci, 310 F.2d 817 (2d Cir. 1962).

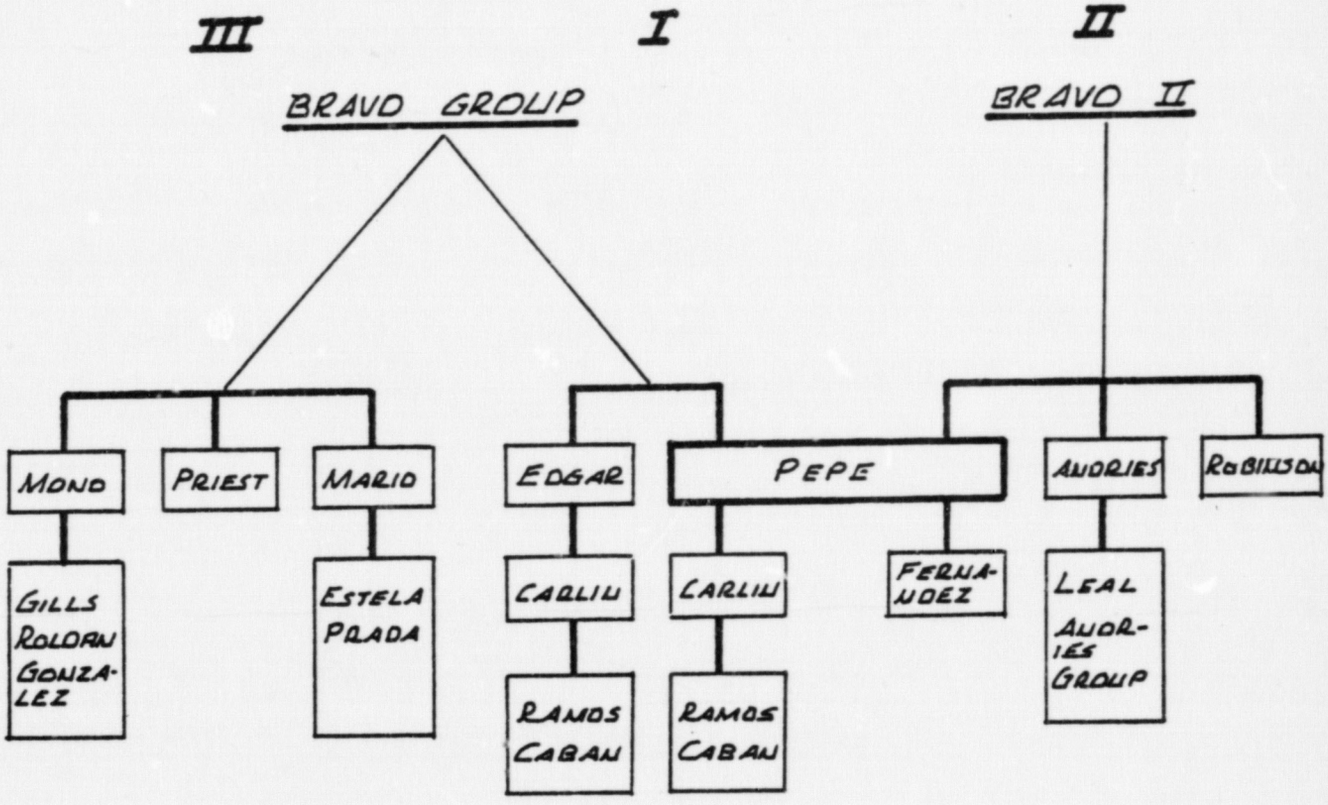
For the non-core defendants, however, imputed knowledge can often realistically run only to the vertical operation of which they are a part. Therefore,

a hub/spoke description rather than a chain more accurately pictures their connections to others on the various horizontal levels. United States v. Borelli 336 F.2d 376, 383 (2d Cir. 1964) makes the point:

> "As applied to the long term operation of an illegal business, the common pictorial distinction between 'chain' and 'spoke' conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs - in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy."

Descriptions in more recent cases, e.g. United States v. Bynum, 485 F.2d 490 at 985-96, also demonstrate that the "familiar pattern" of narcotics operations, which permits imputed knowledge of wider scope, is a "vertically integrated" combination. (The language is Bynum's repeated in Mallah. See also United States v. Miley supra at 1206-07).

A chart of the Government's proof demonstrates that the "single conspiracy" theory cannot stand in this case:



Segment II is clearly not part of a single conspiracy with Segments I and III. The source is different, and except for Pepe Cabrera, there are no common links. The most that can be said is that Pepe Cabrera, one of the conspirators in Segment I, fled New York at about the time the Segment I activities came to an end, and started to deal in Miami with Gaston Robinson and the Billy Andries organization.

It is established, however, that activites by a member of one group do not turn the separate members of the first group into co-conspirators with the separate members of the second, where the two groups are not otherwise connected. That is the holding of United States v. Miley, supra, where Brandt and Miley were engaged in one conspiracy with Goldstein, Bachia and Godinsky, and in another with Lang, Wenzler, Flores and Vavarigos, but no other evidence linked Goldstein, et al, to Lang, et al. It is the holding of United States v. Bertolotti, supra. It applies with full force here where Andries and Robinson had neither the same source nor any other link to Segment I.

We can put it another way. The Government's proof just will not sustain an argument that the individuals in Segments I and III reached an agreement to associate with the Billy Andries - Gaston Robinson activities in Segment II. Our point becomes even stronger when it is considered that most of Segment II's dealings came after the arrests of the individuals in Segment I and that most of the participants in Section III did not enter the scene until after the proof ended in Segment II.

B. Segment I is a different conspiracy from Segment III.

We submit, moreover, that the proof makes out three conspiracies in that Segment I is a different conspiracy from Segment III. Granted that the source (the Bravo Group) is the same, and that Pepe Cabrera is also mentioned in Segment III. However, the importers are different, the dealers are different, the time frame is different and so is most everything else. The personnel in Segment I have either been arrested or have fled. We have then two different vertical chains, linked at the top.

While two such chains can become one conspiracy as in United States v. Sperling, supra, where there is "common direction from the core conspirators, commingling of assets, mutual dependence and common business offices,"[33/] that argument becomes much more difficult when, as here, the two chains exist in different time frames. Cf. United States v. Borelli, supra, at 383-84:

> ". . .whatever the value of the chain concept where the problem is to trace a single operation from the start through its various phases to its successful conclusion, it becomes confusing when, over a long period of time, certain links continue to play the same role but with new counterparts, as where importers who regard their partnership as a single continuing one, having successfully distributed one cargo through X distributing organization, turn, years later, to moving another cargo obtained from a different source through Y. Thus, however reasonable the so-called presumption of continuity may be as to all the participants of a conspiracy which intends a single act, such as the robbing of a bank, or even as to core of a conspiracy to import and resell narcotics, its force is diminished as to the outer links - buyers indif-

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33. The quotation is this Court's description of the Sperling conspiracy in United States v. Mallah, (supra, at 976.)

> ferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers."

For example, it is very difficult to make Beatrice Gonzalez, who purchased money orders for Mono in May 1974, and is on the extreme end of one vertical chain, a co-conspirator with Carmen Caban, who dealt drugs for Morty Carlin in 1971, was arrested and began to co-operate with the Government in April 1974 and is on the extreme end of the other.

We satisfy other tests. Sperling would inquire whether the ties within Segment I were stronger than those between Segment I and Segment III.[34] They were. Many of the defendants in Segment III were personal friends or relatives of Mono and Mario, and were probably involved only because of that relationship. Beatrice Gonzalez, for example, was a friend of Mono's who purchased money orders for him. Estella Rodriguez, an unindicted co-conspirator, assisted Mario Rodriguez because she was his common law wife and the mother of

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34. We shall not address the Sperling tests in terms of Segment II. Those tests apply a fortiori in the case of that Segment.

his two children. These people had no allegiance to Edgar or Pepe, the importers in Segment I. By the same token, Carman Caban, Annie Sanjurjo and Rita Ramos were involved in Segment I because they were paramours of Pepe, Edgar and Morty Carlin.

Another test in Sperling was the use of common witnesses. In the case at bar, none existed. Segment I required the testimony of Carmen Caban and Rita Ramos. Proof on Segment III was primarily Operation Banshee - surveillance and wiretaps wherein neither Caban nor Ramos testified.

C. Separate Indictments on the three different Segments Demonstrate the existence of Separate Conspiracies.

The Government's prosecutorial treatment of these cases also demonstrates that there was no "single conspiracy".

Based on the Caban and Ramos cooperation the Government first returned Indictment 74 CR 494 which parallelled the proof as to Segment I. The Bravo Group, Pepe and Edgar are prominent. Carmen Caban (referred to as Carmen Colon) and Rita Ramos are unindicted co-conspirators. Although there are references to impor-

tatic through Miami, neither Billy Andries nor Gaston Robinson is mentioned, and it is clear that the "importation" referred to is importation by the Bravo Group.

Indictment 74 CR 817 followed and parallelled the proof as to Segment II. The acts charged principally concern Pepe, Gaston Robinson and Billy Andries. The Bravo Group is conspicuously absent from the indictments. The source of drugs in 817 is clearly not that group.[35]

Indictment 939 came in October, 1974, covered Segment III, and was predicated on the wiretaps and surveillance of Operation Banshee on the activities of Mono and Mario. Although the Bravo Group is included, neither Pepe nor Edgar is named in the indictment as a defendant or as co-conspirator. There is no suggestion that the presence of the Bravo Group defendants ties the conspiracy to 494, in which they are also named.

In sum, in the Government's view, the three segments were sufficiently separate in time, activities, and witnesses to sustain separate indictments and trials as to each. The case at bar is parallel to the Special Agents' memorandum in Bertolotti, which referred to

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35. Edgar is also named as a defendant in 817. This is because Andries recalled meeting a Hernandez and Edgar was also known as Omar Hernandez. At the trial, however, it was established that this was not Edgar (T-2218).

"conspiracy No. 1"and"conspiracy No. 2," and which was a significant factor in this Court's finding of multiple conspiracies.

To argue that the Government's investigation was continuing is spurious. It was complete on October 4, 197 , when the Government filed 939. Yet, the separate format continued with that indictment. It continued through November 27, 1974, when the Government filed 1128 to supersede 494 (A-82a) and through April, 1975 with separate proceedings before Judges Tyler and Pollack on 939, separate proceedings on 817, and separate proceedings before Judge Cannella on 1128 (formerly 494).

The conclusion is inescapable. There was no single conspiracy here. The sole reason for the prosecution format was the tactical advantage and convenience to the Government of a mass conspiracy trial. United States v. Bertolotti, 529 F.2d at 155. The Government's action openly defied this Court's warning in Sperling and the reiteration of that warning in Miley. Both came before the superseding indictment and long before the trial. If this Court was more patient with the Government in Miley because the indictment and trial preceded

Sperling (513 F. 2d at 1207 n. 10), Bertolotti demonstrated that no such tolerance would obtain when Sperling was disregarded (529 F. 2d at 155 n. 10).[35a]

D. All Appealing Defendants were Prejudiced by the Inflammatory and Startling Testimony Admitted in The Segment II Conspiracy as well as voluminous Prejudicial Testimony in The Segments with which They were not connected.

The prejudice question is simple. Bertolotti, supra, sets the standards; we have only to supply the details.[36] Some of the standards used are, as follows:

1. The number of defendants and co-conspirators involved;

2. The length of the trial;

3. The extent of illegal activities of others not on trial;

4. The introduction of inflammatory or shocking testimony with respect to a conspiracy for which a particular defendant is not connected.

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35a. The trial was only two weeks old when Bertolotti came down. Defendants moved to sever on several occasions based on the decision. These motions were all denied. (T-1983-84; T-2025; T-2419.)

36. Individual appellants may address this question further as the question of prejudice may affect their individual cause.

In the case at bar, the Government saw fit to join 38 defendants and to name 410 co-conspirators in its Bill of Particulars. This Court reversed a conviction in Bertolotti which involved 17 trial defendants and onl 31 unindicted co-conspirators. Kotteakos v. United States, 328 U.S. 750, involved 13 defendants and 4 unindicted co-conspirators. Not without reason is the size of a trial important. In any ordered system of justice, one's guilt or innocence must be individual. It is virtually impossible for a jury to particularize the evidence against single individuals where there are 450 to keep track of. There is also substantial danger, even if the jury could particularize, that their mood would turn from a specific assessment of the facts to a generalized belief that anyone remotely involved in this trial must surely be guilty. Significantly, after 9000 pages of testimony, the jury found all defendants guilty after deliberating for approximately one day.

This trial was one of the longest narcotics conspiracy trials in the Southern District of New York. It consumed 14 weeks of testimony and in excess of 9000 pages of transcript. This Court reversed in Bertolotti which involved only 2700 pages of transcript and consumed only 4 weeks of trial. There is a subliminal effect upon individuals when exposed to certain topics

for long periods of time. One can only imagine the effect on the jury in this case, being exposed to 14 weeks of testimony concerning cocaine and marijuana seizures. Even the Court, trained in impartiality and cool evaluation of facts, commented in exasperation:

> "We are knee deep in cocaine and this is almost ludicrous at this point." [T-1188]

It appeared to the Court after 1200 pages of testimony that everyone on trial was "knee deep in cocaine." The case against the Segment I defendants, PARRA, GOMEZ and EDGAR, ended on November 11, 1975. The trial started on October 20th, yet, for the next 10 weeks the Segment I defendants were obliged to sit in the Courtroom during some of the most damaging testimony of the trial; testimony that in no way involved them. The attorney[37/] for defendant, Julian Carrion Arco, not an appellant, cross-examined only 2 witnesses during the trial. The attorney for Leon Velez did not rise to speak until late in November, more than one month after the trial began.

In the instant case, the jury was exposed to

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37. Michael Warshaw.

some of the most shocking and inflammatory testimony heard in a court of law. Not only was each appellant prejudiced by material brought out in conspiracies with which they had no part, but even with respect to segments with which they were connected, matters were brought out of such an inflammatory nature when weighed against its probative value as to deny appellants a fair trial.

During the direct testimony of William Andries, the following occurred:

> "Q. What was Rhonda's relationship with Pepe, if any?
>
> A. They were girl friend and boy friend, I guess.
>
> Q. How old was Rhonda, if you know?
>
> A. 15." [T-2013-14]

The age and relationship of Rhonda[38/] to Pepe, had no relevance to the issue of whether PARRA, GOMEZ, EDGAR or any of the Segment III defendants were members of a conspiracy. The United States Attorney must have known how inflammatory bringing out her age would be for

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38. Rhonda Sue Shirah, a named defendant but not a trial defendant.

he mentioned it in his summation. Indeed, the fact that she was being used as a courier and was arrested in New York in possession of 5 kilos of cocaine made the disclosure of her age even more devastating. The prejudice was clear and could be reasoned as follows: Any man who would use a 15 year old girl to transport cocaine is a man beneath contempt. Any person connected with him, be they friends or business associates must be equally rotten. Pepe was connected with drugs and therefore anyone connected with drugs must also be contemptible. The reasoning need not even be that structured. Indeed, a generalized visceral reaction as to all those on trial may have been expected to settle upon the jury.

If this were but one isolated incident in this trial, it might be deemed harmless error. Alas, it was merely one drop of a torrent of prejudicial material, which had the effect of depriving all defendants of a fair trial.

By far the most devastatingly prejudicial testimony came during the Segment 2 aspect of the trial. This portion of the trial did not involve any of the appealing defendants and referred only to one trial defendant, to wit: Gaston Robinson. This Court, in

Bertolotti, supra. stated that where "shocking" or "inflammatory" testimony is brought out concerning a separate conspiracy, the requisite prejudice is made out. This is true even where there is a showing of only two conspiracies. Even if Segment 1 and III in this case is viewed as a single conspiracy there is still sufficient prejudice in Segment 2 standing alone to warrant reversal.

The Segment 2 portion of the trial featured the testimony of William Andries who was on the witness stand for several days. His life, as portrayed by him, can only be described as a cross between John Dillinger and "Machine Gun" Kelly. One would be hard put to name a crime which Andries had not committed several times over. He admitted to being a smuggler of Heroin, as well as Cocaine and Marijuana (T-1977); he conceded he had killed an individual by shooting him 13 times (T-2051, 2178); he acknowledged to having conspired to murder one Stanley Harris (T-2052, 2179); he stated he had bribed jurors during two separate trials (T-2053); he had threatened to blow up a National Airlines jet unless he was paid money (T-2175); he had committed more than 100 armed robberies (T-2165, 2174);

he had engaged in 800 burglaries (T-2175); he extorted $80,000 from a Dade County female judge after filming her in a series of homosexual acts with a young girl (T-2176, 7); he had committed male prostitution (T-2091); income tax evasion (T-2037); perjury (T-2057) and had even shot at his wife with a .357 magnum (T-2180) one of a large assortment of weapons with which he was customarily armed (T-2179).[39]

Andries also testified that he saved over $1,500,000.00 during the period of one year in the narcotics business and brought in over twenty shipments of drugs, including 200 kilos immediately prior to his arrest (T-2197). He literally had money to burn (T-2022).

Nor was Andries' litany of crimes the sole area of inflammatory testimony. Inflammatory, indeed, were his boat burning proclivities. He would smuggle drugs into the United States through various Florida ports by small speed boats. To avoid detection, should his boats be inspected, he would scrub out the boats so that no residue of cocaine or marijuana would remain. After a time, the scrubbing job became too tedious and the

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[39] Among his weapon paraphernalia were silencers for these guns.

boats were merely burned. The profits were so enormous that he could well afford this convenience. He burned approximately 10 boats prior to his retirement in March, 1974 (T-2022).[40]

In February 1974, he picked up a load of 7500 pounds of marijuana off "Riding Rock" in the Bahamas (T-2017). Andries, Phil and Bobby Miller met a ship called The Patty II. They then unloaded the marijuana onto trucks with the help of various members of his group[41] and delivered "a load of guns" to The Patty II (T-2019) to be taken back to Columbia.[42] This talk of gun-running by Andries was in no way part of the overall conspiracy. Yet the jury was exposed to this inflammatory testimony.

Nor was this the only prejudicial reference to guns in the second segment of the trial. Fernandez testified that he observed Pepe buy large quantities of guns from Joseph Leal (T-2408) who was part of

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40. Andries buried his money in his 6 acre backyard. Unfortunately he was unable to find much of his money.

41. Red Cove, Vinnie, Patsy, Maurice Maurino, Phil Siegel. None of those named were defendants in this case.

42. The Patty II was subsequently seized by the Cuban government and the gunds confiscated.

Andries' organization.

He further testified that Pepe flaunted a gun at him at Hialeah Race Track and threatened to kill him if he didn't reimburse Pepe for cocaine which an undercover agent had confiscated from Fernandez at the time of his arrest. [T-2418] This testimony was over the vehement objection of counsel [T-2419].

Fernandez also testified that Pepe intended to steal a shipment of cocaine from "Ramiro" and "Mario" because "Pepe and Ramiro had a war between them." [T-2459]

During the trial Gaston Robinson fled which had a devastating effect on the attitude of the jury, particularly since the flight immediately followed the testimony of Andries.

The statement of facts sets forth numerous drug seizures in Segment I and Segment III. Most of these seizures are of individuals who the government knew would not proceed to trial, and in fact were not on trial at the time of their testimony. These individuals were also relatively minor characters, usually couriers.

For example, in Segment 1, Antonio Romero was arrested at Kennedy Airport in February, 1973, while transporting cocaine in the false bottom of a dog cage. (T-1406). The seized drugs and photographs were introduced into evidence. In February 1973, Annie Sarjurjo was arrested in Los Angeles Airport (T-1399) for smuggling cocaine into the United States in her bra and girdle (T-1399). The photographs, drugs and other physical evidence was introduced. On July 16, 1973, Jose Hurtado was arrested for smuggling cocaine at Los Angeles Airport (T-1872) in a white cloth belt with 2-1/2 kilograms of cocaine. The cocaine and other physical evidence was introduced into evidence.

It should be pointed out that even this segment of the conspiracy, which to some degree directly involved only defendants PARRA, GOMEZ and EDGAR, not to mention the segment III defendants, required them to sit in the courtroom powerless to object as this type of evidence mounted and could almost visably be seen to sway the jury. Their repeated objections were unavailing as they saw the jury's mood turn from a specific assessment of the facts to a generalized belief that anyone remotely involved in this trial must surely be guilty. As events later proved, these fears were fully justified.

These seizures from insignificant couriers continued during Segment III. On July 14, 1974, a woman named Maria Morena was arrested in Toronto International Airport in possession of cocaine secreted in coat hangers [T-4794-4854], and three individuals named Jorge Hernandez, Jose Crug and J se Pizzaro were arrested in the Ontario Motel, Buffalo, New York, on July 15, 1974 [T-4854], awaiting the pickup.

On July 11, 1974, a man and a woman named Raul Diaz and Carmenza Gomez were arrested at Kennedy International Airport. Gomez had cocaine strapped to her body.

On August 23, 1974, a man named Alvar Hernandez was arrested on East 125th Street for cocaine possession [T-5226].

On July 7, 1974, Daniel Torres was arrested at 52nd Street and Roosevelt Avenue, Queens, New York, after leaving the Kenne[illegible] International Airport [T-5132-5136].

There was even a telephone conversation where Mario threatened to kill LaNegra unless she complied with his wishes for payment for a cocaine seizure.

In light of the foregoing, it is perhaps appropriate to cite a portion of this Court's opinion in Bertolotti, supra:

> "The prejudicial effect, however, of requiring the jury to spend two entire days listening to obviously shocking and

inflammatory discussions about assault, kidnapping, guns and narcotics cannot be underestimated. No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. With respect to at least five of the appellants, no such proof was ever convincingly produced." (At page 158).

## POINT II

THE DISTRICT COURT ERRED IN GIVING ONLY A ONE HOUR CHARGE, WITH ONLY SEVEN PAGES ON THE CONSPIRACY ISSUES, AND NO FOCUS ON THE INDIVIDUAL DEFENDANTS

At the end of the three month trial, the district court delivered a charge which lasted a little over an hour, covering fifty record pages. That charge failed to meet the standards fixed by this Court.

As we have shown, the Government's evidence cried out for careful exposition of the single conspiracy issue, and detailed instructions to enable the jury to separate out the individual defendants in terms of the possible conspiracies shown by the proof. This Court had warned in United States v. Borelli, supra that:

> "Where the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance, the Court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all-or-nothing basis as to all defendants." (336 F. 2d at 386 n. 4.)

United States v. Kelly, 349 F. 2d 720, 757-58 (2d Cir. 1965) had added that "appropriate focus" includes marshalling the proof as to each defendant, whether defendants want it or not. And United States v. Bynum, supra, and United States v. Sperling, supra, had made particular reference to the "meticulous" marshalling below, 485 F. 2d at 499; 506 F. 2d at 1341, the former consisting of eighteen record pages, in sustaining the convictions there.

The Court below did none of this. It originally suggested that it not marshall the evidence because that would hurt defendants. It was speaking in general about all proof, including acts of the unindicted co-conspirators, the unarrested defendants, those who were dead, those who had fled, and so forth. While the defense counsel agreed, (with one exception), that agreement went only to the Court's desire not to

restate all the Government's evidence. It did not extend to a failure to marshall anything - - something the Court could not properly have suggested in the first place, or agreed to even if counsel had wanted it. United States v. Kelly, 349 F. 2d at 757. In fact, several defense counsel had submitted requests which contained a marshalling of the contentions as to their clients for purposes of having the jury decide whether their clients had joined the conspiracy. The Court below ignored these requests.

In the end, the Court's charge stated nothing specific, only generalities. It told the jury that the Government must succeed if the proof showed:

> "That there was this Colombian group down in Colombia, where the source was, that they had people that would smuggle these controlled substances into the United States through the various ports of entry that have been described: Miami, Texas, Los Angeles, Canada, and that this was intended for the New York market, where it was to be distributed." (T-8585.) 43/

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43. The court charged that proof of several separate conspiracies was not proof of a single conspiracy, and that unless the Government proved a single conspiracy, all defendants must be found not guilty (T-8583-84.) (footnote continued on next page.)

It never mentioned the various factors set forth in Point I, for example, the separate source in Segment II, as bearing on the multiple conspiracy issue. It did not mention one of the individual defendants by name in the conspiracy discussion, and never did it frame an issue in terms of the facts applicable to any such defendant. After three months of trial, and days of prejudicial testimony unconnected to the trial defendants, the whole conspiracy portion of the charge came to seven pages. And those seven pages had to make do for consideration of issues as to thirteen separate defendants.

In the face of such a charge, the convictions cannot stand.

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The Court refused a request that if the jury found more than one conspiracy, it could find guilt against the persons who were members of both conspiracies (T-8599.)

Most of the trial defendants are found in only one segment of the conspiracy. But Edgar was indicted in both the first and second segments, and the Government pictured him as a major defendant. This charge, therefore, was the equivalent of an instruction that the jury could not acquit the minor defendants without also acquitting Edgar. This instruction was held to be "plain error" in United States v. Kelly, 349 F. 2d at 757-58.

## POINT III

### EXTENSIVE LISTENING TO NON-SUBJECT CONVERSATIONS WHEN THOSE PARTIES WERE KNOWN TO THE AUTHORITIES INVALIDATED THE WIRETAPS.

A large part of the Government's Operation Banshee proof was conversations monitored on the following New York State wiretaps:

1. Lilia and Ruben Prada, January 2 -January 31, 1974, 118 West 109th Street, Manhattan, amended on January 11, 1974 to include "Manuel" as a subject.

2. Mario Rodriguez, Estella Rodriguez and Merida, January 28 - February 26, 1974, 80-15 41st Avenue, Queens, New York.

3. Mario Rodriguez, Estella Rodriguez and Juan Guillermo, March 13 to April 10, 1974, 80-15 41st Avenue, Queens, New York.

4. El Mono and Bernardo Roldan, May 2 - May 21, 1974, 215 East 64th Street, Manhattan.

5. El Mono and Bernardo Roldan, June 6 - July 5, 1974, 215 East 64th Street, Manhattan.

6. Mario Rodriguez, Estella Rodriguez and Carlos Vazquez, June 26 - July 25, 1974, 61-25 98th Street, Queens, New York.

7. Mario Rodriguez, Estella Rodriguez, Jorge Gomez, and El Mono, July 26 - August 24, 1974, 61-25 98th Street, Queens, New York.

8. Mario Rodriguez, Estella Rodriguez, El Mono, Mirella Haller and Walter, August 16 - September 14, 1974, 61-20 Grand Central Parkway, Queens, New York.

9. Mario Rodriguez, Estella Rodriguez, Mirella Haller and Walter, September 15 - October 15, 1974, 61-20 Grand Central Parkway, Queens, New York.

Motions were made by Ruben Roldan, Mono and others to suppress the taps. All were denied, without hearing and without opinion.

The District Court erred. The wiretap applications and orders showed on their face [and this was confirmed by several of the conversations introduced at trial], that the police officers were listening to conversations between persons who were not subjects of the taps, without proper spot monitoring of those conversations. They did so at a time, furthermore, when they knew the identity of those persons, and could have obtained proper orders from the Court.

We start, for example, with wiretap Appendix D,[44/] the application to tap the Mario Rodriguez phone, and the Cestare Affidavit in support thereof. In Par. 30 and 32 Cestare sets forth conversations between Estella Rodriguez and Merida Sanchez. These conversations were overheard on the tap of Lilia Prada's phone, and neither Merida nor Estella were subjects on that tap. At the outset of the conversations, Merida and Estella identify themselves, and Merida says immediately that Lilia Prada -- the subject of the tap -- is not there, "She's out." Yet, the listening goes on with no thought that the subject might come on, the only possible justification for continued listening.

These improperly heard calls led the state to Estella Rodriguez.

Next, we have a series of calls on the Mario Rodriguez phone between Alberto Bravo, a non-subject, with other non-subjects. The taps on Mario's phone authorized for January 28 to February 26, and later

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44. The applications and orders were each denominated by a separate Appendix letter, ranging from A - M.

from March 13 to April 10, included as subjects only Mario, Estela, and (later) Juan Guillermo. The police knew, however, that Alberto Bravo, whom they identified, was supplying Mario and that he was talking on Mario's phone, so that he could have been named as a subject. See Par. 17, 60, Cestare Aff., Wiretap Appendix E. He was not so named.

The police, nonetheless, started listening in to Bravo's conversations, as well as those of a Carlos, with other non-subjects. They did it, moreover, at a time when they knew that Mario and Estela were no longer in the apartment, so that the subjects could not come into the conversation.

The relevant conversations are set forth in Pars. 8, 17, 19, 21, 26, and 29 of the Caracapa Affidavit in Appendix G. For example, in the conversation set forth in Par. 29, Mono asks for Juan and is specifically told by Carlos that he is not there. The police know that Mario and Estela have moved out of the apartment. Notwithstanding that no subject could come on, they continue listening, knowing (see Par. 43 of the Caracapa Aff.) that Alberto and Carlos are not subjects and can not be listened to.

Finally, on April 30, 1974, the District Attorney applied for an order to amend the earlier orders nunc pro tunc, to make Alberto and Carlos named subjects and to permit the use of calls between Alberto, Mono and Carlos. The order was granted [Appendix F] and made effective as of January 28, 1974, when the taps on Mario's phone first started.

The same thing happened again when the officers started extensive listening of non-subject calls on Mono's phone. The parties here were Ruben Roldan, Guillermo Palacio, and Ernesto Guillo. The District Attorney knew their identity and could have named them as subjects. In Mario's case, the non-subject listening started in March and the nunc pro tunc order was secured on May 1. On Mono's phone, the non-subject listening took place in May and June, and there was not even a nunc pro tunc order naming them as subjects, until August 30, 1974, allegedly because the service was disconnected on June 14, 1974. The matter is fully set out in wiretap Appendix I.

In United States v. Capra, 501 F.2d 267 [2d Cir. 1974], this Court held that listening to non-subject conversations invalidated at least parts of the tap and that the defect could not be cured by a nunc pro tunc amendment in the order. Here the practice continued throughout and invalidates the entire taps.

## CONCLUSION

THE CONVICTIONS OF EACH OF THE APPELLANTS SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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